

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 50 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MAHESH ASSANDAS LILWANI

Versus

BHAVNA MAHESH LILWANI

Appearance:

MR JH TOLANI for Appellant

MR RD DAVE for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 25/09/96

ORAL JUDGEMENT

By means of filing this appeal under section 100 of the Code of Civil Procedure, 1908, the appellant has questioned legality and validity of judgment and order dated February 29, 1996, rendered by the learned District Judge, Kutch at Bhuj, in Regular Civil Appeal no. 46/95 by which the judgment and decree dated April 10, 1995,

passed by the learned Extra Assistant Judge, Kutch, Bhuj,

in H.M.P.No.18/92 granting divorce by mutual consent under section 13-B of the Hindu Marriage Act,1955 are set aside.

2. The appellant is husband of the respondent. Marriage between the parties was solemnized on December 27,1988. During the lawful wedlock a female child was born named Heena. After some time disputes and differences arose between the parties. Therefore, both of them started staying separate from each other. On February 23,1992 an agreement was entered into between the parties and it was agreed to present a joint petition for divorce under section 13-B of the Hindu Marriage Act,1955 ("Act" for short). Accordingly, on the next day i.e. on February 24,1992, the appellant and respondent had jointly presented a petition for dissolution of marriage by decree of divorce in the District Court and it was numbered as H.M.P.no.18/92 in the Court of learned Extra Assistant Judge, Kutch, Bhuj. In the petition it was mentioned that the parties had been living separately for a period of more than one year and were not able to live together and had mutually agreed for dissolution of the marriage.

However, it is an admitted position that the respondent submitted an application on August 8,1992 i.e. before expiry of period of six months contemplated by sub-section (2) of Section 13-B of the Act and withdrew the consent.

3. Placing reliance on the decision rendered in the case of RAJ RANI vs. ROOP KUMAR 1990(2) D.M.C.142, the Court of first instance took the view that the respondent was not entitled to withdraw the consent after accepting Rs.72,000/- pursuant to agreement executed between the parties on February 23,1992. In that view of the matter, the learned Judge passed a decree of divorce by judgment and order dated April 10,1995 declaring that the marriage

stood dissolved with effect from the date of decree.

4. Feeling aggrieved by the decree of divorce passed by the Court of first instance, the respondent preferred Regular Civil Appeal no. 46/95 in the District Court, Kutch at Bhuj. The learned Appellate Judge placed reliance on the decision of the Supreme Court rendered in the case of SMT. SURESHTA DEVI vs. OM PRAKASH, A.I.R. 1992 S.C. 1904 wherein it is held that a party to a petition for divorce by mutual consent under section 13-B of the Act can unilaterally withdraw the consent and the

consent once given is not irrevocable. The learned appellate Judge held that as the respondent had withdrawn the consent before expiry of period of six months, the Court of first instance was not authorised to pass a decree for divorce. In that view of the matter, the learned Judge allowed the appeal by judgment and order dated February 29, 1996 giving rise to the present appeal.

5. The learned Counsel for the appellant submitted that the respondent was not entitled to withdraw unilaterally the consent and, therefore, decree passed by the Court of first instance under section 13-B of the Act should not have been interfered with by the appellate court. It was pleaded that the respondent had given consent unilaterally and neither undue influence nor coercion was exercised by the appellant at the time when the consent was given by the respondent, as a result of which the decree of divorce should not have been refused on the ground that consent given by the respondent was subsequently withdrawn by her. Placing reliance on the decision rendered in the case of ASHOK GOVINDRAM HURRA vs. ROOPA ASHOK HURRA, 37(2) G.L.R. 650 it was asserted that the respondent was not entitled to withdraw the consent once given and, therefore, the second appeal should to be entertained.

6. Mr. R.D.Dave, learned Counsel for the respondent contended that a party to a petition for divorce by mutual consent under section 13-B of the Act can unilaterally withdraw the consent and as the consent was withdrawn by the respondent, the first appellate court was justified in reversing the decree of divorce passed under the provisions of Section 13-B of the Act. It was pleaded that the question posed for consideration of the Court in the second appeal is settled by the decision of the Supreme Court rendered in the case of SMT.SURESHTA DEVI (Supra) and as second appeal does not involve substantial

question of law, it should not be entertained by the Court.

7. From the facts which have been noted above, it is evident that marriage between the parties was solemnized on December 27,1988. Thereafter disputes had taken place between the parties and, therefore, parties had started residing separate from each other. On February 23,1992 an agreement was executed between the parties whereby it was agreed to present a joint petition for divorce as contemplated by section 13-B of the Act. Accordingly, a joint petition for divorce was presented before Court on February 24,1992, but before expiry of period of six months, the respondent had filed an application on August 18,1992 and withdrawn the consent. The question whether a party to a petition for divorce for mutual consent presented under section 13-B of the Hindu Marriage Act,1955 can unilaterally withdraw the consent or not, is considered and finally decided by the Supreme Court in the case of SMT.SURESHTA DEVI (Supra). In that case, the appellant and respondent were married on November 21,1968 and had lived together for about 6 to 7 months. The appellant did not stay with her husband thereafter. On January 8,1985 the appellant and respondent had presented a petition under section 13-B of the Act for divorce by mutual consent in the District Court at Hamirpur. On January 9,1985 the Court had recorded statements of the parties and left the matter there. On January 15,1985, the wife had filed an application in the Court stating that her consent was obtained under pressure and threat. By filing said application, the wife had prayed the Court to dismiss the petition which was presented under section 13-B of the Act. The learned District Judge dismissed the petition for divorce, but upon appeal, the High Court reversed the order of the District Judge and granted decree for dissolution of marriage by mutual consent. The wife, therefore, challenged the decree passed by the High Court before Supreme Court. The Supreme Court has examined scope of section 13-B of the Act in detail and held that a party to a petition for divorce by mutual consent under section 13-B of the Hindu Marriage Act,1955 can unilaterally withdraw the consent and the consent once given is not irrevocable. Looking to sub-section (2) of Section 13-B of the Act it is evident that the filing of the petition with mutual consent does not authorise the Court to make a decree for divorce because there is a period of waiting from 6 to 18. During this interregnum period the parties are entitled to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with

the petition. There is nothing in the Section which prevents such a course and the Section does not provide that if there is a change of mind, it should not be by one party alone, but by both. Reading Section 13-B of the Act, it is clear that Court has to be satisfied about bonafides and the consent of the parties. If there is no mutual consent at the time of enquiry, the Court gets no jurisdiction to make a decree for divorce because sub-section (2) requires the Court to hear the parties which means both the parties and if one of the parties at that stage says that the consent is withdrawn, Court cannot pass a decree of divorce on the ground of mutual consent having been arrived at between the parties. Having regard to the principles laid down by the Supreme Court in the above mentioned case, I am of the view that the respondent was entitled to withdraw the consent and, therefore, the Court of first instance had no jurisdiction whatsoever to pass a decree of divorce on the ground of mutual consent of the parties.

8. The submission that in view of the decision rendered by the learned Single Judge of this Court in the case of ASHOK GOVINDRAM HURRA (Supra) the present appeal should be entertained, is devoid of merits. In my view, what is laid down in the said decision is that if the petition is not withdrawn during the transitional period, Court shall and must pass a decree if the ingredients of Section 13-B are satisfied. However, Mr. R.D. Dave, learned Counsel appearing for the respondent has brought to the notice of the Court that the decision rendered by the learned Single Judge in the case of ASHOK GOVINDRAM HURRA (Supra) has been reversed by Division Bench comprising B.C. Patel & S.D. Dave, JJ in Letters Patent Appeal No. 373/96 decided on September 9, 1996. The fact that the decision rendered by the learned Single Judge is reversed by the Division Bench is not in dispute. Even otherwise the facts of the case unequivocally show that before the expiry of the transitional period the respondent had withdrawn her consent by submitting an application on August 18, 1992. Under the circumstances, the principle laid down in the above quoted decision would not apply to the facts of the present case. The decision rendered by the learned Single Judge is of no avail to the appellant.

9. From the above discussion, it is apparent that the learned first Appellate Judge has correctly applied the principle of law to the proved facts. The consent having been withdrawn by the respondent before expiry of period of first six months, decree of divorce on the ground of mutual consent could not have been passed by

the Court of first instance and, therefore, the learned appellate Judge was justified in reversing the said decree. The point which is sought to be raised is well settled by the decision of the Supreme Court rendered in the case of SMT. SURESHTA DEVI(Supra). Therefore, it is difficult to conclude that Second Appeal instituted by the appellant involves substantial question of law. As the Second Appeal does not involve a substantial question of law, it cannot be entertained in view of the provisions of Section 100(1) of the Code of Civil Procedure. Under the circumstances, the Second Appeal filed by the appellant is liable to be dismissed.

For the foregoing reasons, I do not find any substance in the Second Appeal. The Second Appeal, therefore, fails and is summarily dismissed.